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In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM HOYLE McCRIGHT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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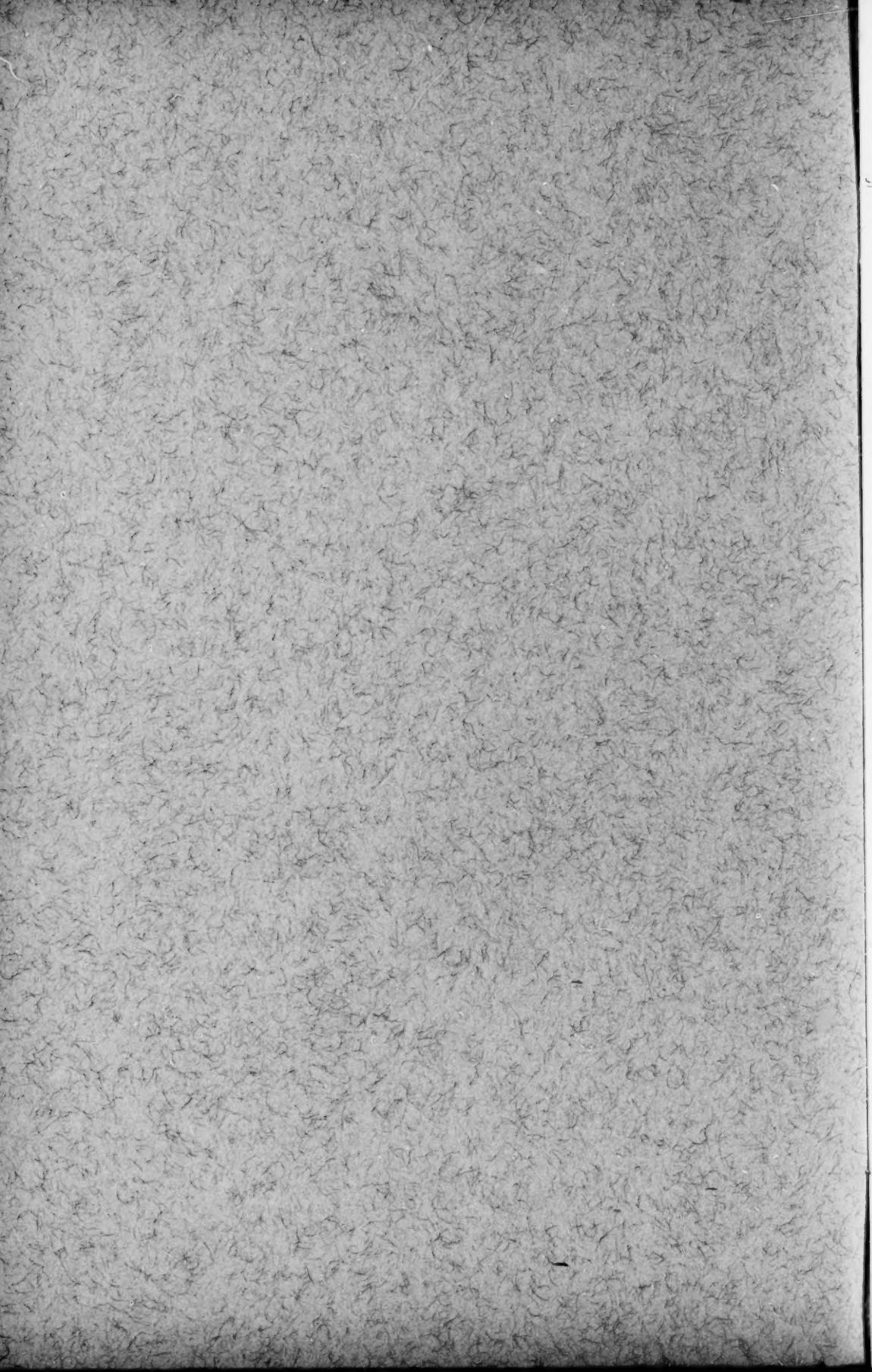
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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's convictions on two counts of making false entries on bank reports, in violation of 18 U.S.C. 1005.
2. Whether petitioner's conviction on one of the two counts must be vacated under the "exculpatory no" doctrine.

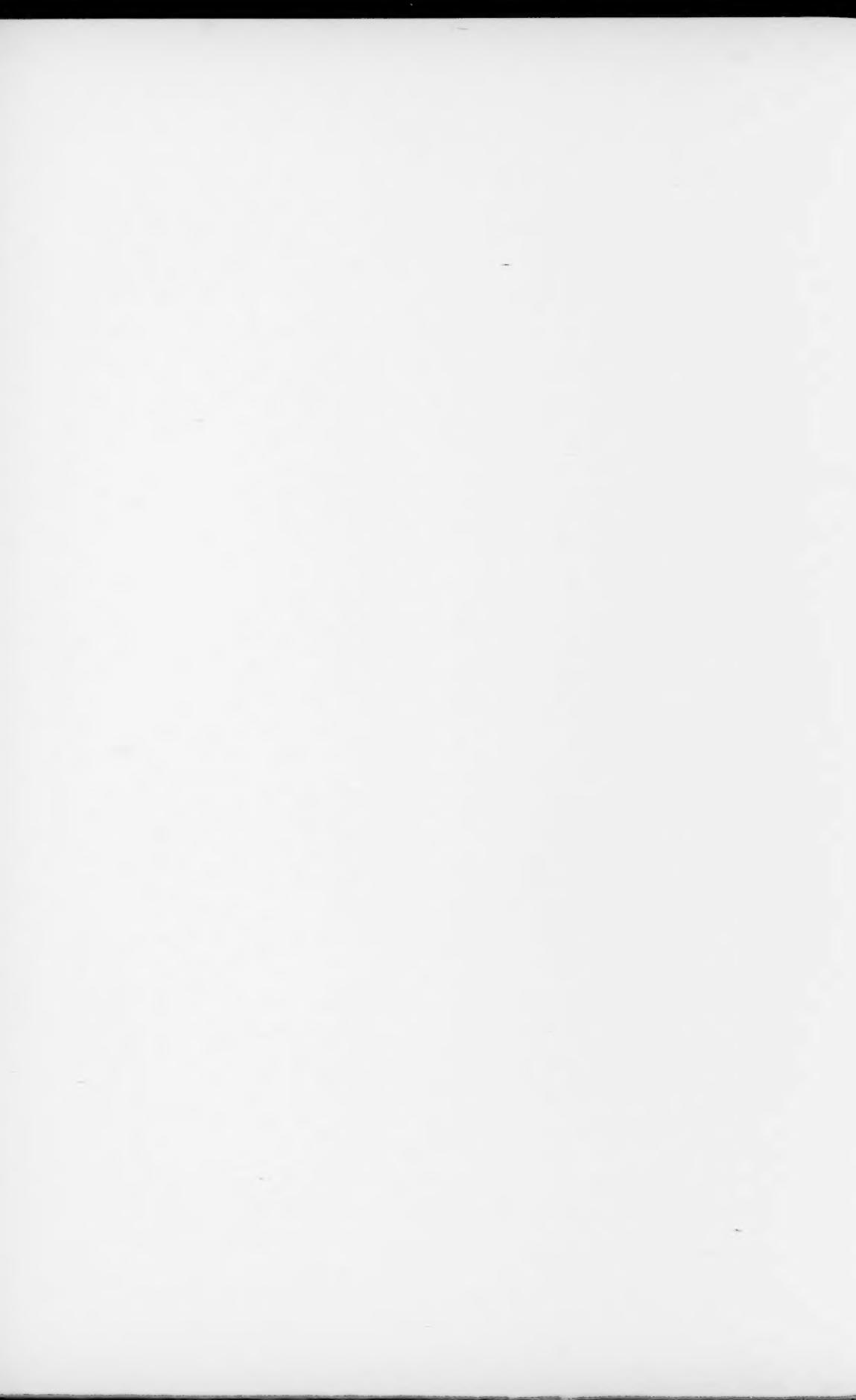


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No. 87-553

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 821 F.2d 226.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1987. A petition for rehearing was denied on August 26, 1987. The petition for a writ of certiorari was filed on October 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of misapplication of bank funds (Count 1), in violation of 18 U.S.C. 656; fraudulent participation in a bank loan (Count 2), in violation of 18 U.S.C. 1006; and making false entries on bank reports (Counts 3 and 4), in violation

of 18 U.S.C. 1005. He was sentenced to consecutive terms of three years' imprisonment on each count, and he was fined \$5,000 on each count, for a total sentence of 12 years' imprisonment and a total fine of \$20,000. The court of appeals reversed petitioner's convictions on Counts 1 and 2 and affirmed his convictions on Counts 3 and 4. The court vacated all of the sentences and remanded for resentencing. Pet. App. A1-A2.

1. Between 1977 and 1982, petitioner was one of two Executive Vice Presidents of the First National Bank of Midland, Texas; he also served as a member of the bank's board of directors. The evidence at trial revealed "a long and complicated history of self-interested dealing" by petitioner (Pet. App. A2). In 1978, petitioner formed a partnership with Sam Conner and James Eastup, which they named "CEK." The court of appeals explained: "The initials referred to Conner, Eastup and McCright, respectively. They decided to use 'K' instead of 'M' because they did not think 'it would be wise' to let it be known that McCright was a partner, even though they owned equal shares in CEK." *Ibid.* CEK borrowed "substantial amounts from [petitioner's bank] to finance approximately 40 oil ventures and real estate deals" (*ibid.*). Petitioner approved many of the loans, but his name was never reflected on the notes as one of the borrowers (see 3 R. 106-107; GX 12). When the profits were subsequently divided, they were funneled through another account, usually a Merrill Lynch money market account, before petitioner received his share. That procedure had the effect of concealing petitioner's participation in the partnership. Pet. App. A2-A3, A4.

In 1980, petitioner purchased a one-sixth interest in the Bedford ranch. Conner and Eastup also purchased one-sixth shares, and two other persons each purchased one-quarter shares. One year later, the five co-owners sold the ranch to Pen-Dee Corporation, which borrowed approxi-

mately \$1 million from petitioner's bank to finance the purchase. Petitioner appraised the property for the bank, estimating its value at twice the sale price, without disclosing his financial interest in the sale. The loans were structured in a way that the sellers' lien on the property was superior to the bank's lien. Pen-Dee subsequently defaulted on the loan, and petitioner and the other sellers regained title to the ranch. The bank, which never collected the unpaid balance of its loan, failed in 1983. Pet. App. A4-A5.

2. Petitioner's bank, which was federally insured, required its officers and directors to disclose certain interests and investments that involved the bank or customers of the bank. The information was gathered to comply with "Regulation O" (12 C.F.R. 215), which requires the disclosure of loans to executive officers, directors, and principal shareholders of banks, and to obtain information that should be disclosed to the bank's shareholders or potential investors. See Pet. App. A9. In February 1982, petitioner filed a response to a questionnaire that asked him to "list any corporation, partnership, trust, association, joint venture, pool syndicate, sole proprietorship, unincorporated organization or other form of business entity * * * of which you * * * [o]wn, control or have the power to vote 10 percent or more of the total interest in the entity" (*id.* at A11). Petitioner did not reveal that he held a one-sixth interest in the business entity that had purchased the Bedford ranch and then sold it to Pen-Dee Corporation, retaining a security interest. His failure to do so was the basis for the charge in Count 3 of the indictment that petitioner had violated the bank false statement statute, 18 U.S.C. 1005.¹

¹ The indictment also charged that petitioner failed to reveal in response to the form that he held interests in two other business entities. The court of appeals affirmed the conviction on the basis of petitioner's failure to reveal his interest in the ranch. Pet. App. A10.

In June 1982, petitioner completed another questionnaire for the bank. Question 8 stated (see Pet. App. A13): "With regard to yourself, your associates and/or any firm, corporation or other entity with which you have a position or relationship, please describe any material interest, direct or indirect, in any transaction occurring since January 1, 1981, or in any present or proposed transaction, to which [petitioner's bank], its subsidiaries or any of the employee benefit plans, retirement plans or trusts of either [petitioner's bank] or any of its subsidiaries, was, is or is to be a party." Petitioner responded "none," even though he held a one-third interest in CEK, which had engaged in numerous transactions with the bank. That response was the basis for the charge in Count 4 of the indictment, which alleged a violation of Section 1005.

3. The court of appeals upheld petitioners' convictions on Counts 3 and 4 (Pet. App. A8-A16). With respect to Count 3, the court rejected petitioner's argument, which was based on his "belief that landed interests do not constitute a form of business entity" (*id.* at A12), that he did not have to disclose his one-sixth interest in the business entity holding a secured interest in the Bedford ranch in response to the February 1982 questionnaire. The court concluded that "[a]lthough some forms of land ownership would not be considered business related," petitioner's "participation in the joint venture to purchase and sell the Bedford ranch unquestionably constituted the type of business enterprise that should have been disclosed on the questionnaire" (*ibid.*). It added that "the evidence overwhelmingly supports the jury's verdict that in failing to disclose this interest [petitioner] intended to injure or defraud the bank," an element of Section 1005 (Pet. App. A12-A13).

With respect to Count 4, the court first rejected petitioner's contention that the government had failed to prove that he had a "material interest," as Question 8 of

the June 1982 questionnaire specified, in any transaction to which the bank was a party. Petitioner contended that, because two other questions on the questionnaire required the disclosure of interests only where the bank was owed at least \$5 million (see Pet. App. A14 & n.6), he reasonably assumed that a "material interest" existed only in such circumstances. The court noted that the questionnaire defined "material" as "those matters to which an average prudent investor ought reasonably to be informed before buying or selling the security registered" (*id.* at A14). It then rejected his "sophistic argument that because other questions on the form had a \$5 million cutoff, question eight must have had the same," adding that "his premise compels just the opposite conclusion: if a specific limit were intended on question eight it would have been stated therein" (*ibid.*). The court further stated that petitioner's argument that "a simple misreading of a bank form could lead to a felony conviction under section 1005 is misplaced," because that statute requires proof of a false entry made with intent to injure or defraud, adding that "[t]his necessary element was amply demonstrated in the present case" (*ibid.*).

Finally, the court rejected petitioner's argument, made with respect to Count 4, that his conviction is barred by the "exculpatory no" doctrine. The court noted (Pet. App. A15) that it had held in prosecutions under 18 U.S.C. 1001, which prohibits false statements to federal officials, that mere negative responses to questions propounded by a federal investigator are not criminal when a true answer would be incriminating. However, the court stated, the "exculpatory no" doctrine does not extend beyond Section 1001 and, in any event, the June questionnaire "presents none of the circumstances usually associated with the 'exculpatory no' notion * * * [since it] was not part of, or for use in, a government investigation" (Pet. App. A15).

ARGUMENT

1. Petitioner first renews his contention (Pet. 7-10) that the evidence did not support his conviction on Count 3. He argued that he did not have to disclose on the February 1982 form his one-sixth interest in the business entity that held a secured interest in the Bedford ranch since the interest in question was an interest in land. As the court of appeals concluded (Pet. App. A12), however, there is no merit to that argument. The question at issue asked petitioner to disclose the identity of any business entity in which he had a ten percent interest (*id.* at A11). The evidence at trial showed that petitioner had a sixteen percent interest in the group that bought the ranch and, after its sale, held a secured interest in it. The evidence further showed that that investment was made with his partners in CEK – Conner and Eastup – and that they bought the land for the purpose of selling it later for capital gains (*id.* at A12). Petitioner's interest in the property was plainly the type of business interest that should have been disclosed on the questionnaire.²

Petitioner next argues (Pet. 10-11) that the evidence did not support his conviction on Count 4 because the government failed to prove that the transactions that he did not disclose in response to the June 1982 questionnaire had a "material" effect on the bank. Petitioner primarily argues (an argument not made below) that the definition of "material" under the Securities Act of 1933, 15 U.S.C. (& Supp. IV) 77a *et seq.*, is relevant and requires proof relating to the financial condition of the bank and the effects of the transactions on the price of its stock. There is no basis for that argument. The relevant definition of

² Petitioner argues (Pet. 8-9) that, assuming that the question was meant to include business interests in land, he was not required to disclose his interest because it was less than a twenty-five percent interest. However, the question asked for the disclosure of interests exceeding ten percent (Pet. App. A11).

"material" is the definition contained in the questionnaire, which asked for information that an average prudent investor would want to know (Pet. App. A14). Because petitioner held a concealed one-third interest in CEK, while approving loans to it, he was lending the bank's money to himself, and a prudent investor would surely want to know about such transactions. Accordingly, the court of appeals correctly held that petitioner should have disclosed his one-third interest in CEK in response to Question 8 on the June 1982 questionnaire.

2. Nor is there merit to petitioner's argument (Pet. 11-12) that his conviction on Count 4 is barred by the "exculpatory no" doctrine. As the court of appeals stated (Pet. App. A15), that rule, which has never been extended to a Section 1005 prosecution, is not applicable here since petitioner's false statement was not made to a government investigator during the course of a criminal investigation. See, e.g., *United States v. Lambert*, 501 F.2d 943, 946 (5th Cir. 1974) (en banc); *Paternostro v. United States*, 311 F.2d 298, 305 (5th Cir. 1962). Moreover, while petitioner's disclosure of his interest in CEK would have revealed a blatant conflict of interest, it would not necessarily have shown that he had committed a crime. To the extent that the "exculpatory no" doctrine is based on the Fifth Amendment's protection against compulsory self-incrimination (Pet. App. A15; *Lambert*, 501 F.2d at 946 n.4), the doctrine would be inapplicable for that reason as well. In addition, allowing false negative answers by bank officers to questions concerning their interests in outside entities doing business with the bank would totally frustrate the purpose of Section 1005, which is to ensure that the bank's records accurately reflect the condition of the bank (*United States v. Giles*, 300 U.S. 41, 48 (1937); *United States v. Darby*, 289 U.S. 224, 226 (1933)), since bank officers could distort bank records yet avoid prosecution by failing to reveal conflicts of interest. Accordingly, as the

court of appeals concluded, the “exculpatory no” doctrine should not be extended to Section 1005.

To be sure, the court of appeals’ conclusion that the “exculpatory no” doctrine does not extend beyond Section 1001 prosecutions is contrary to an Eleventh Circuit decision, *United States v. Payne*, 750 F.2d 844 (1985), which stated that the doctrine applies in prosecutions under 18 U.S.C. 1006. The difference of opinion between the two circuits regarding the applicability of the “exculpatory no” doctrine in cases other than Section 1001 prosecutions is not a conflict that warrants review in this case, however. Regardless of its applicability to Section 1005 prosecutions, the “exculpatory no” doctrine would not have been available in this case under any circuit’s test. Thus, the Eleventh Circuit would have found the “exculpatory no” doctrine inapplicable to petitioner’s conduct and would have upheld the conviction here.

In the *Payne* case, the President of a federal land bank made false entries on a conflict of interest form regarding his participation in some land transactions. The Eleventh Circuit concluded (750 F.2d at 861-863) that the “exculpatory no” doctrine extends to Section 1006, which prohibits false statements to federal land banks, but held that the exception did not apply in the circumstances of that case (750 F.2d at 864-866).³ The court stated that “the ‘exculpatory no’ doctrine requires the reversal of a false statement conviction under 18 U.S.C. § 1006 only if truthful affirmative answers would have been incriminating” and

³One judge concurred, noting that, since the court concluded that the “exculpatory no” doctrine did not require reversal of the defendant’s conviction, that part of its opinion concluding that the doctrine applied in Section 1006 prosecutions was “not necessary to the decision” (750 F.2d at 867). Under that view, the conclusion in *Payne* that is contrary to the decision below is mere *dictum*.

further ruled that the "exculpatory no" rule "is properly characterized as an 'affirmative defense' on which the defendant must bear the burden of proof" (*id.* at 863 & n.22). It then held that the defendant "did not establish that he reasonably believed that truthful affirmative answers would have been incriminating" (*id.* at 865). That court presumably would have reached the same conclusion here, since petitioner (who put on no evidence at trial (Pet. 7)) did not establish that a truthful answer to Question 8 would have been incriminating.⁴ Accordingly, there is no disagreement among the courts of appeals that warrants this Court's attention in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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⁴ In fact, from all that appears, a truthful answer would *not* have been incriminating. Regulation O regulates but does not prohibit all loans to insiders (see 12 C.F.R. 215.4 and 215.5), and it provides for civil, but not criminal, penalties (12 C.F.R. 215.11).